A **KERAJAAN NEGERI PAHANG**

v.

WONG KIM WAH & ANOR

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: C-01-379-2009]
C 10 SEPTEMBER 2012

CONTRACT: *Assignment - Assignment of receivables - Recovery of losses - Whether all losses within scope of term in assignment - Whether claim were for moneys purportedly due arising from breach of terms of* D *contract - Whether damages can only arise pursuant to order made by court of law or lawfully appointed arbitrator - Whether respondent could recover damages from appellant pursuant to assignment*

On 9 June 1980, a contract was entered between the appellant E and the second respondent for the second respondent to undertake certain works ('the said contract'). On 17 August 1982, by an agreement in writing entered into between the respondents, a portion of the said contract was subcontracted to the first respondent. On the same date, the second respondent by a F document titled 'Assignment Of Receivables' ('the assignment') also assigned all monies due and payable in respect of the said subcontract undertaken by the first respondent to be paid directly to the first respondent by the appellant. On 28 August 1982, the appellant consented to the said assignment of receivables. On 27 G October 1984, the first respondent by reason of its inability financially to continue with the execution of the sub-contracted works (due to the hardship caused by the appellant's breaches) served on the appellant a notice terminating the sub-contract forthwith. On 14 December 1984, the appellant gave notice to the H second respondent to terminate the main contract. In the meantime, having received no payment, the first respondent instituted an action against the appellant. The first respondent sought to recover the losses and damages purportedly suffered by it arising from the termination of the subcontract. The High Court I held that (i) the appellant was obliged in law to honour the assignment by paying directly to the first respondent all monies due

and payable for the work undertaken by the first respondent pursuant to the subcontract and (ii) that there was privity of contract between the appellant and the first respondent, thus all losses suffered by the first respondent were claimable by them from the appellant. Hence, the appellant appealed. The issue that arose herein was whether the first respondent could recover damages from the appellant pursuant to the assignment.

Held (allowing the appeal in part)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The trial judge when considering the various form of losses claimed by the first respondent under the assignment ought to have considered whether all of the losses were within the scope of the term in the assignment 'moneys which are now or may hereafter be due and payable'. This was because the said term represented a debt whereas the bulk of the losses claimed by the first respondent were in fact for damages. The claims forming the subject matter of claim by the first respondent apart from the claim for unwarranted deductions were not for moneys due under the subcontract but for moneys purportedly due arising from a breach of the terms of the subcontract/main contract. Damages can only arise pursuant to an order made by a court of law or a lawfully appointed arbitrator pursuant to the terms of the main contract. Thus, based on the terms of the assignment, the trial judge ought to have dismissed the claims of the first respondent apart from the claim for unwarranted deductions. (para 9)

(2) On a proper construction of the assignment, it was evident that the claim for damages was not assigned to the first respondent based on the terms of the assignment. This claim could only have been pursued by the second respondent. Accordingly, this court allowed the appeal in part by setting aside all the orders of the High Court judge apart from the order dealing with unwarranted deductions. As regards unwarranted deductions, to the extent that the progress payments had been quantified as RM7,939,313.25, the claim of the first respondent was clearly limited to this amount subject to any variation. (para 12)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Pada 9 Jun 1980, satu kontrak telah dimasuki di antara perayu dan responden kedua supaya responden kedua melaksanakan kerja-kerja tertentu ('kontrak tersebut'). Pada 17 Ogos 1982, melalui persetujuan secara bertulis yang dimasuki di antara responden-responden, sebahagian kontrak tersebut telah disubkontrak kepada responden pertama. Pada tarikh yang sama, responden kedua melalui dokumen bertajuk 'penyerahhakkan penghutang' ('penyerahhakkan') telah menyerahkan semua wang yang terhutang berkenaan dengan subkontrak tersebut yang dilaksanakan oleh responden pertama untuk dibayar terus kepada responden pertama oleh perayu. Pada 28 Ogos 1982, perayu telah bersetuju dengan penyerahhakkan penghutang tersebut. Pada 27 Oktober 1984, responden pertama oleh sebab ketidakupayaan kewangan untuk meneruskan dengan pelaksanaan kerja-kerja subkontrak (kerana kesusahan yang disebabkan pelanggaran-pelanggaran perayu) telah menyerahkan kepada perayu notis menamatkan subkontrak dengan serta merta. Pada 14 Disember 1984, perayu telah memberi notis kepada responden kedua menamatkan kontrak utama. Dalam masa yang sama, setelah tidak menerima apa-apa bayaran, responden pertama memulakan satu tindakan terhadap perayu. Responden pertama cuba untuk memulihkan kerugian dan gantirugi yang didakwa yang telah dialaminya daripada pembatalan subkontrak. Mahkamah Tinggi memutuskan bahawa (i) perayu bertanggungjawab dari segi undang-undang menghormati penyerahhakkan dengan membayar terus kepada responden pertama semua wang yang terhutang dan harus dibayar bagi kerja-kerja yang dilaksanakan oleh responden pertama menurut subkontrak dan (ii) bahawa terdapat priviti kontrak di antara perayu dan responden pertama, oleh itu responden pertama boleh menuntut daripada perayu segala kerugian yang dialaminya. Oleh itu, perayu merayu. Isu yang timbul adalah sama ada responden pertama boleh mendapatkan gantirugi daripada perayu menurut penyerahhakkan.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara apabila mempertimbangkan pelbagai bentuk kerugian yang dituntut oleh responden pertama di bawah penyerahhakkan sepatutnya mempertimbangkan sama ada segala kerugian adalah termasuk dalam skop terma

penyerahhakkan 'wang yang kini atau selepas ini terhutang dan kena dibayar'. Ini adalah kerana terma tersebut mewakili hutang manakala sebahagian besar daripada kerugian yang dituntut oleh responden pertama sebenarnya bagi gantirugi. Tuntutan yang menjadi halperkara tuntutan responden pertama selain daripada tuntutan bagi potongan tidak wajar bukanlah wang yang perlu dibayar di bawah subkontrak tetapi adalah wang yang kononnya perlu dibayar akibat pelanggaran terma-terma subkontrak/kontrak utama. Gantirugi hanya boleh berbangkit menurut perintah yang dibuat oleh mahkamah undang-undang atau penimbangtara yang dilantik dengan sah di bawah terma-terma kontrak utama. Oleh itu, berdasarkan terma-terma penyerahhakkan, hakim bicara harus menolak tuntutan-tuntutan responden pertama selain daripada tuntutan potongan tidak wajar.

(2) Menurut pembentukan sesuai penyerahhakkan, adalah jelas bahawa tuntutan gantirugi tidak diberikan kepada responden pertama berdasarkan terma-terma penyerahhakkan. Tuntutan ini hanya boleh dituntut oleh responden kedua. Sewajarnya, mahkamah ini membenarkan sebahagian rayuan dengan mengenepikan perintah-perintah Hakim Mahkamah Tinggi selain daripada perintah berhubungan potongan tidak wajar. Berhubungan potongan tidak wajar, setakat bayaran secara progresif ditetapkan sebagai RM7,939,313.25, tuntutan responden pertama jelas terhad kepada amaun ini tertakluk kepada apa-apa perubahan.

[Perintah sewajarnya.]

Case(s) referred to:

Flood v. Shand Construction Ltd & Others [1996] 54 Con LR 125 ***(refd)***

For the appellants - Mat Zaaraai Alias (Kamal Azira with him); State Legal Advisor

For the 1st respondent - Shahrul Hamid Amiruddin (Norliza Rasul Khan with him); M/s Zul Rafique & Partners

For the 2nd respondent - Vignesh; M/s Balendran Chong

[Appeal from High Court, Kuantan; Civil Suit No: 379-1985]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Anantham Kasinather JCA:

Background Facts

B **[1]** On 21 February 1980, the 2nd respondent accepted a tender called for by the appellant, for certain works defined therein. On 9 June 1980, a contract was entered between the appellant and the 2nd respondent for the 2nd respondent to undertake these works (the said contract). About two years later, C by a letter dated 12 August 1982, the 2nd respondent notified the appellant that it proposed to subcontract part of the said contact to the 1st respondent as well as assign the receivables and sought the appellant's consent to the same (see R/P Jilid 2 Bahagian C-103H at 161).

D

[2] On 17 August 1982, by an agreement in writing entered into between the respondents, a portion of the said contract was subcontracted to the 1st respondent. On the same date, the 2nd respondent by a document titled 'ASSIGNMENT OF E RECEIVABLES' ('the assignment') also assigned all monies due and payable in respect of the said subcontract undertaken by the 1st respondent to be paid directly to the 1st respondent by the appellant. On 28 August 1982, the appellant consented to the said assignment of receivables (see Jilid 2 Bahagian C-103C F at 599).

[3] On 27 October 1984, the first respondent by reason of its inability financially to continue with the execution of the subcontracted works (due to the hardship caused by the appellant's breaches), served on the appellant a notice terminating G the subcontract forthwith. On 14 December 1984, the appellant gave notice to the 2nd respondent to terminate the main contract and further demanded payment on the guarantee given by Asiavest Merchant Bankers (M) Bhd for the benefit of the 2nd respondent (see Jilid 2 Bahagian C-103I at pp. 587-588). In the meantime, H having received no payment, on 30 August 1985, the 1st respondent instituted the present action against the appellant. As of 31 October 1984, the certified amount outstanding from the appellant to the 1st respondent (excluding stand by charges due to delays, miscellaneous contractual claims and financing costs) I

amounted to RM3,132,520 (see Jilid 2 Bahagian C-103F at 281) as shown in the appellant's own document (see Jilid 2 Bahagian C-103F at pp. 258 to 285). On 8 September 1986, the 2nd respondent was added as a third party by the appellant.

[4] In the action filed against the appellant, the 1st respondent sought to recover the losses and damages purportedly suffered by it arising from the termination of the subcontract (see para. 10 of the judgment of the court). The 1st respondent claimed to have suffered six different forms of losses. These losses were particularised to be the following:

(i) Standby charges due to delay – RM4,896,031;

(ii) Miscellaneous contractual claims – RM663,847;

(iii) Outstanding payments for measured works – RM231,356.98;

(iv) Outstanding escalation costs – RM125,911.14

(v) Unwarranted deductions – RM3,132,520;

(vi) Financing costs – RM1,819,877

Issues

[5] At the High Court, the following were the issues resolved by the learned trial judge as being necessary for determination at the trial:

(i) What is the nexus between the 1st and 2nd respondents;

(ii) Is there a relationship between the 1st respondent and the appellant, and if so, what is the nature of the relationship between them;

(iii) Did the 1st respondent suffer damages, and if so, can the 1st respondent claim against the appellant; and

(iv) In all the circumstances of the case, what are the 1st respondent's remedies?

Decision Of The High Court

[6] On the conclusion of the trial, the learned Judicial Commissioner provided the following answers to the four issues:

(i) Since it is not disputed that the 1st and 2nd respondents had executed the assignment and the subcontract agreement, the 1st and 2nd respondents were in a contractual relationship;

A (ii) to the extent that the appellant had consented to both the said agreements *vide* its letter dated 28 August 1982, the appellant was obliged in law to honour the assignment by paying directly to the 1st respondent all monies due and payable for the work undertaken by the 1st respondent
B pursuant to the subcontract;

(iii) since the 1st respondent had undertaken the subcontract works, Her Ladyship concluded that there was privity of contract between the appellant and the 1st respondent and for
C this reason, Her Ladyship ruled that all losses suffered by the 1st respondent were claimable by them from the appellant.

Decision Of The Court

[7] We are in agreement with the ruling of the learned trial
D judge on the first and second issues. In our judgment, the answer to the third issue requires a careful consideration of the nature and scope of the assignment. This is because the rights of the 1st respondent as the assignee under the assignment as against the appellant obligor depends entirely on the nature and scope of
E the assignment. For this reason, we propose to set out in detail the following clauses in the assignment:

(a) Whereas to facilitate billing and payment processes, the assignor has agreed to assign to the assignee, any moneys
F which are now or may hereafter be due and payable to the assignor under the said main contract specifically in respect of the subcontract works subject to the terms and conditions hereinafter contained and which remaining amounts are estimated as follows:

G

Subcontract Works	**Estimated Remaining Sum**
Preliminaries	M$ 709,474.75
Road No. B/2	1,657,373.10
H Road No. B/3	1,044,446.13
Bridge No. 12-27	2,999,172.35
Total	M$ 7,939,313.25

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(b) Now therefore, for and in consideration of the foregoing premises, assignor hereby assigns in assignment, the right to receive directly from the Pahang Government all payments as and when they become due and payable by the Pahang Government to the assignor under the ... (not legible) only provisional and subject to variations as provided for in the main contract, under the following terms and conditions to wit:

(1) The billing procedure as established in the sub-contract agreement, including without limitation, the verification and approval by the assignor of the monthly work accomplishments shall be strictly observed. No billing shall be submitted to the Government of Pahang without such approval.

(2) The assignee's right hereunder shall be restricted to the right to receive payments from the Pahang Government in respect of the said contract with particular reference to the works only. Any dispute arising out of the main contract shall not in any way affect this assignment, it being understood that the main contract is an agreement entirely between the assignor and the Pahang Government.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) This assignment shall not in any way affect the rights and obligations of the parties under the main contract with the Pahang Government, and the subcontract between CDCP and assignee.

[8] In the High Court, very little attention appears to have been directed as to the nature and scope of the rights of the 1st respondent as assignee under the assignment as against the appellant. Based on the submissions put before Her Ladyship, the focus of the High Court was merely directed as to whether the assignment took the form of an absolute or an equitable assignment and whether the assignment created privity of contract between the appellant and the 1st respondent. With respect, even

less attention was directed as to whether the 1st respondent could claim for damages from the appellant having regard to the words in the assignment limiting the 1st respondent's rights *vis a vis* the appellant to 'any moneys which are now or may hereafter be due and payable to the assignor under the main contract specifically in respect of the subcontract works' with a cap of RM7,939,313.25 'subject to variations as provided for in the main contract'. The learned trial judge without the benefit of adequate submissions on this aspect of the assignment and the law applicable to the same, after holding the assignment to be valid proceeded to order judgment in favour of the 1st respondent for all of the losses set out in para. 4 above. Her Ladyship after posing the question "Can the plaintiff claim damages from the 1st defendant?" answered this question in the affirmative based on the assignment (see para. 29 of the judgment of the court). Her Ladyship thereafter proceeded to examine the evidence led by the 1st respondent on the quantum of damages purportedly suffered by it.

[9] With respect, in our judgment, the answer to the question as to whether the 1st respondent can recover damages from the appellant pursuant to the assignment is not as simple as was made out to be by the High Court. In our judgment, the learned trial judge when considering the various form of losses claimed by the 1st respondent under the assignment ought to have considered whether all of the losses were within the scope of the term in the assignment 'moneys which are now or may hereafter be due and payable'. This is because 'moneys which are now or may hereafter be due and payable' represent a debt whereas the bulk of the losses claimed by the 1st respondent were in fact for damages. We opine to this effect because the claims forming the subject matter of claim by the 1st respondent (more particularly set out in para. 4 of this judgment) apart from the claim for 'unwarranted deductions' were not for moneys due under the subcontract but for moneys purportedly due arising from a breach of the terms of the subcontract/main contract. In our judgment, damages can only arise pursuant to an order made by a court of law or a lawfully appointed arbitrator pursuant to the terms of the main contract. That claims for damages have to be resolved by the medium of the main contract is best illustrated by the terms of cls. 2 and 8, set out in para. 7 of this judgment. The subcontract serving to regulate the contractual relationship between the 1st and 2nd respondents only. Accordingly, in our judgment, based

on the terms of the assignment, the learned trial judge ought to have dismissed the claims of the 1st respondent apart from the claim for unwarranted deductions.

[10] We are fortified in coming to this conclusion by the decision of the Court of Appeal in England in the case of *Flood v. Shand Construction Ltd & Others* [1996] 54 Con LR 125. In this case, the High Court had similarly allowed a claim for damages notwithstanding that the assignment was limited to 'all claims for debts or for money due under the contract'. Evans LJ in allowing the appeal from the judgment of the learned trial judge opined as follows:

> Second, the judge accepted the submission that 'any sum which is or may become due and payable under this sub-contract' includes both contractual sums or debts and damages claims (at 17). In the course of doing so, he held that 'all claims for debts or for money due under the contract can be expressed as claims for damages, namely as claims flowing from a breach of the obligation to pay sums due within the timeframe provided for by the sub-contract (at 19). I am not sure that I understand this passage in his judgment. If he meant that there is a right to claim damages for the non-payment of a debt or for the non-payment of damages, then in my view that is incorrect: (cf President of *India v. Lips Maritime Corp* [1987] 3 All ER 110 at 117, [1988] AC 395 at 425 per Lord Brandon. The question in my view is whether 'sum due and payable' includes a claim for damages or for an amount which has to be established by operation of contractual machinery or otherwise, and in my judgment for the reasons given above it does not.

[11] Sir Iain Glidewell T delivering the second judgment of the court in the same case dealt with the same issue in this manner:

> I have some difficulty in understanding how a claim for damages for breach of contract can be said to be a claim for a sum due under the contract. However, it is clear that this part of the claim can only fall within the proviso if the alternative claim for the sums alleged to be due under the contract is within the proviso. If it is, the question whether the claim for damages is also within the provision ceases to be important.

A The basis of the submissions of Mr Powell QC for Mr Flood, that the claim for sums allegedly due under the subcontract is within the proviso is based on section 136(1) of the Law of Property Act 1925, which, so far as is material, provides that:

> B Any absolute assignment by writing ... of any debt or other legal thing in action ... is effectual in law ... to pass and transfer ...(b) all legal and other remedies for the same ...

I might have found this argument persuasive were it not for the decision of this Court in *Yeandle v. Wynn Realisations Ltd (in administration) (formerly C J Pearce & Co Ltd)* [1995] C 47 Con LR 1, of which the official referee was unaware. Evans LJ has set out in his judgment the material passages from the judgments of Hobhouse LJ and Sir Thomas Bingham MR in that case, which was concerned with the proper interpretation of the very clause to which this appeal relates. That decision is, in my D view, authority for the proposition that an assignment of a sum which is or may become due and payable to him under this subcontract' does not operate as an assignment of the right to take whatever preliminary steps are necessary to establish that a particular quantified sum is due and payable. In other words, if it has already been agreed or established that a given sum is, or on E the happening of uncertain future events will be, due and payable, an assignment of the sum acts as an assignment of the right to recover that sum if it be not paid but not more.

[12] On a proper construction of the assignment, it is evident F that the claim for damages was not assigned to the 1st respondent based on the terms of the assignment. This claim could only have been pursued by the 2nd respondent. Accordingly, we allowed this appeal in part by setting aside all the orders of the learned High Court judge apart from the order G dealing with unwarranted deductions. As regards unwarranted deductions, to the extent that the progress payments had been quantified at RM7,939,313.25, the claim of the 1st respondent was clearly limited to this amount subject to any variation. We disallowed the claim for miscellaneous charges because there was H no evidence of any variations having been undertaken by the 1st respondent in accordance with the terms of the assigned subcontract. Since the parties were in agreement that the sum of RM3,038.890.08 represented the unwarranted deductions, we ordered that this amount be paid to the 1st respondent. We I dismissed the appeal against the 2nd respondent. We ordered the appellant to pay costs of RM20,000 to the 1st respondent and costs of RM5,000 to the 2nd respondent.